A

Anshin Steel Processor Sdn Bhd (previously known as Acsan Steel Service Centre Sdn Bhd) v Chung Cha Boo (t/a Yong Enterprise)

B

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–715 OF 2009
SEE MEE CHUN J
28 MAY 2014

C

Contract — Breach — Fundamental breach — Defendant cancelled purchase orders for balance of steel coils after first shipment delivered allegedly did not comply with specifications — Whether defendant failed to prove specifications were not complied with — Whether cancellation of balance purchase orders wrongful and D *breached term of fundamental importance — Whether plaintiff had proven losses sustained — Whether defendant's counterclaim unproven*

The plaintiff sued the defendant for losses it sustained as a result of the defendant's cancellation of orders it had made for the purchase of steel coils. E The defendant had ordered 290 tons of steel coils from the plaintiff which had to be cut according to various sizes specified by the defendant. The first shipment ordered required the plaintiff to cut and deliver 42.2 tons of the steel coils which was delivered to and paid for by the defendant. The defendant alleged that because the goods delivered did not comply with the specification F ordered, it was entitled to cancel the orders for the remaining 247.8 tons of steel coils. The plaintiff contended that the defendant's cancellation was wrongful and as a result, it incurred losses by having to sell the balance of the steel coils to third parties at much lower prices than that agreed to by the defendant. The defendant raised a counterclaim of RM40,000 claiming that G that was the amount it incurred to rectify defects in the steel coils which were delivered.

Held, allowing the claim and dismissing the counterclaim:

H (1) As there as was no evidence the steel coils which were delivered did not comply with specifications, the court found the defendant had wrongfully cancelled the orders for the balance of the steel coils. It had breached a term of fundamental importance by not taking delivery of the steel coils it had ordered (see paras 10 & 22).

I (2) No documentary evidence was adduced to support the allegations of non-compliance even after the alleged defects were discovered. It was claimed that no written complaints were made but only oral complaints. The invoice and the delivery order clearly stated that any complaint or

discrepancy must be notified to the plaintiff within seven days. There was also no evidence the defendant's payment was made conditionally or under protest (see paras 6–8).

(3) The plaintiff had proven by its invoices and delivery orders that it had incurred the losses claimed by selling the balance steel coils to third parties. On the other hand, the defendant did not produce any documentary evidence to prove its counterclaim that it had incurred RM40,000 to rectify the alleged defects (see paras 21 & 23).

[Bahasa Malaysia summary

Plaintif menyaman defendan untuk kerugian yang dialaminya akibat pembatalan pesanan yang dibuat oleh defendan untuk pembelian gelung keluli. Defendan memesan 290 tan gelung keluli daripada plaintif yang harus dipotong mengikut pelbagai saiz yang dinyatakan oleh defendan. Penghantaran pertama yang dipesan memerlukan plaintif memotong dan menghantar 42.2 tan gelung keluli yang dihantar kepada dan dibayar oleh defendan. Defendan mendakwa bahawa oleh kerana barangan yang dihantar tidak mematuhi spesifikasi yang dipesan, ia berhak untuk membatalkan pesanan untuk baki 247.8 tan gelung keluli. Plaintif berhujah bahawa pembatalan defendan adalah salah dan akibatnya, ia menanggung kerugian dengan menjual baki gelung keluli kepada pihak ketiga pada harga yang lebih murah daripada apa yang dipersetujui oleh defendan. Defendan membangkitkan tuntutan balas sebanyak RM40,000 mendakwa bahawa itu adalah jumlah yang ditanggungnya untuk membetulkan kecacatan dalam gelung besi yang dihantar.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas:

(1) Memandangkan tidak terdapat keterangan gelung keluli yang dihantar tidak mematuhi spesifikasi, mahkamah mendapati defendan telah secara salah membatalkan pesanan-pesanan untuk baki gelung keluli. Ia telah memungkiri terma asas penting dengan tidak mengambil penghantaran gelung keluli yang dipesannya (lihat perenggan 10 & 22).

(2) Tiada keterangan dokumentar dikemukakan untuk menyokong dakwaan ketidakpatuhan walaupun selepas kecacatan yang didakwa diperolehi. Dakwaan dibuat bahawa tiada aduan bertulis dibuat tetapi hanya aduan lisan. Invois dan pesanan penghantaran jelas menyatakan bahawa apa-apa aduan atau percanggahan mesti dimaklumkan kepada plaintif dalam masa tujuh hari. Juga tidak terdapat keterangan bahawa bayaran defendan dibuat secara bersyarat atau di bawah protes (lihat perenggan 6–8).

(3) Plaintif telah membuktikan dengan invois-invois dan pesanan penghantarannya yang ia menanggung kerugian yang didakwa tersebut dengan menjual baki gelung keluli kepada pihak ketiga. Sebaliknya

A defendan tidak mengemukakan apa-apa keterangan dokumentar untuk membuktikan tuntutan balasnya bahawa ia menanggung sebanyak RM40,000 untuk membetulkan kecacatan yang didakwa (lihat perenggan 21 & 23).]

B **Notes**

For cases on fundamental breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3284–3292.

Cases referred to

C *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, CA (refd)

Central Cables Berhad v Cablecon Sdn Bhd [2011] 1 LNS 1116, HC (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)

D

Ng Mei Quen (Shui-Tai) for the plaintiff.
K Paramanathan (Param & Co) for the defendant.

See Mee Chun J:

E

[1] This is the plaintiff's claim for the amount of RM321,168 for losses incurred as a result of the defendant's cancellation of purchase orders for steel coils. The defendant contends the steels coils which were delivered were not in accordance with specifications thereby leading to the cancellation of the F remaining orders and counterclaims and/or sets-off RM40,000 as the amount spent to modify the steel coils. Witnesses for the plaintiff were Mr Lawrence Lim Aun Chuan ('PW1', managing director and witness statement marked as WSP1) and Mr Koay Boon Hong ('PW2', marketing manager at the relevant time and witness statement marked as WSP2). Witnesses for the defendant G were Mdm Chung Cha Boo ('DW1', the registered sole proprietor of the defendant and witness statement marked as WSD1), Mr Idris Darus ('DW2', supervisor and witness statement marked as WSD2) and Mr Foo Sik Kim ('DW3', manager and witness statements marked as WSD3 and 3(a)).

H AGREED FACTS

[2] From the agreed facts in Bundle 'E' the defendant had issued three purchase orders ('PO') YE-07470 dated 5 June 2008 (B6), YE-07474 dated 7 July 2008 (B7) and YE-07476 dated 17 July 2008 (B8) for the purchase of I 290 tons of steel coils from the plaintiff in various sizes which had to be cut according to the width which would be informed by the defendant. The defendant had instructed the plaintiff on 18 July 2008 (B9) to cut and deliver 42.2 tons of steel coils leaving a balance of 247.8 tons which was thereafter cancelled. The defendant has paid RM177,777 for 42.185 tons.

ISSUE

[3] The primary issue is whether the defendant had wrongfully cancelled the balance of the steel coils ordered. If the cancellation was wrong, the further issue is whether the defendant is liable for the losses sustained by the plaintiff.

(a) Cancellation

[4] The defendant had confirmed receipt of 42.185 tons of steel coils on 1 August 2008 as per invoice and delivery order dated 31 July 2008 in B 10–11. It however said there was non-compliance of specifications as per slitting instruction dated 18 July 2008 with regard to the width tolerance of +/-0.3mm, no uniform width and variation in width.

[5] The steel coils that were delivered are in relation to the 2.0mm PO YE-07474 dated 7 July 2008. The POs had the description 'slitted coil 1.6mm' for a quantity of 80.000 tons, '2mm coil' for a quantity of 150,000 tons and '2mm coil' for a quantity of 60.000 tons. The slitting instruction as per B 9 had the heading 'slitted coil 2mm thk x 62mm width' and 'slitted coil 2mm thk x 64mm width'. There was further the words 'width tolerance +/-0.3mm'. According to DW3 the words width tolerance of +/- 0.3mm meant 'from width of 62mm and 64mm there can be a plus 0.3mm or minus 0.3mm which is acceptable'. DW3 stated the steel coils received did not comply with specifications as 'on paper ie invoice and delivery order it states that width is 62mm and 64mm but the width tolerance was more than -0.3mm'. In cross-examination he stated the steel coils did not comply with specifications and there was no uniform width. It was less than 62mm/64mm or more. For the 62mm the width was 60mm and 59mm and for the 64mm the variation was 3mm with a width of 61mm. The width was not uniform with certain parts less and certain parts more. He agreed there were no written complaints but he said there were oral complaints. There were no documents to show complaints had been made. In re-examination he stated the defendant had to use the steel coils before they knew there were defects and it took ten days for them to realise the defects.

[6] PW1's evidence was that the defendant had never lodged any complaint on the defect and it is stated in the plaintiff's delivery order dated 31 July 2008 any complaint or discrepancy must be made in writing within seven days. In cross-examination he disagreed it is not possible for the defendant to inform of defects within seven days or that the defendant only discovered the defects upon using the steel coils. In re-examinations he said from the delivery order the defendant has checked and it is stated they are to inform within seven days. It is easy to detect defects as it is on measurement and number of steel coils.

[7] It is the court's finding there is no documentary evidence in support the allegations of non-compliance. There were no written complaints made but only oral complaints. In the invoice and delivery order it is clearly stated under 'remarks' that 'In case of discrepancies, kindly inform the seller in writing within seven days from the date of receipt'. PW1 stated the defendant had checked the steel coils and they were required to inform of defects within seven days. It was easy to identify the defects as it was by measurement and the number of steel coils. DW3 had explained they had to use the steel coils before they knew the defects and that for the first ten days they thought it was random and did not make an issue and only after ten days were they very sure of the defects and these were conveyed to PW2 when he visited on 1 October 2008. Even if the court accepts this to be true the fact remains there were no written complaints even after the defects were discovered.

[8] Further the defendant had paid for the steel coils on 6 October 2008 (B 16). DW3 in examination-in-chief said this was on goodwill as they had been dealing with the plaintiff for at least two years. His evidence during trial was that payment was made as the plaintiff had agreed to waive interest. The defendant has therefore given two versions on why payment had been made. In any event there was no evidence payment was conditional or on protest.

[9] The court is unable to accept the photographs in B 13–15 as proof of non-compliance. Although DW3 had attempted to explain what the non-compliance were this was not evident merely by looking at the photographs. There was also no proof these were indeed the steel coils delivered by the plaintiff.

[10] There being no evidence the steel coils delivered did not comply with specifications the defendant had wrongfully cancelled the balance of the steel coils ordered.

(b) Liability arising from cancellation

[11] As a result of the cancellation the plaintiff sold the balance of the steel coils to third parties one of whom was Choo Seng Hardware Co ('Choo Seng'). PW1 referred to its sales contract with its supplier Megasteel in B 25–39 for the purchase of 2.0mm and 1.6mm coils in order to meet the defendant's order. B 159–175 are the invoices and delivery orders from Megasteel to the plaintiff. The quantity of orders did not tally with the defendant's POs so as to always maintain a sufficient and healthy stock to meet the defendant's demand. There were different width of coils ordered by the plaintiff and this would not affect the plaintiff's delivery to the defendant because it would need to be slit into different sizes according to the defendant's instruction.

[12] In Q&A 33 PW1 was referred to B 44 which he said was the plaintiff's schedule to show its losses of RM321,168 due to the sale of balance steel coils to third parties at a much lower price as compared to the agreed purchase price of the defendant and the claim is for the difference in the two prices. He stated B 44 had a typo error on the particulars of the coils slit and the correction is as in the plaintiff's detailed schedule in B 48. The steel coils are now described as:

1(a)1.50mm x 1210mm x C

(b)1.50mm x 1219mm x C

2. 2.00mm x 1524mm x 3048mm.

[13] According to PW1 B 48–50 sets out the details of sales to the third parties with invoice number, quantity, unit price and the total amount of sales between October 2008–March 2009. The plaintiff's invoices and delivery orders are in B 51–158 and the plaintiff had cut and downsized the measurement as well as cut into steel plates and sold to the various third parties.

[14] The evidence of PW1 in cross-examination was that B29 shows the plaintiff had ordered 300 tons of 1.50mm thick and 1210mm width, 150 tons of 2.0mm and 1210mm width and 300 tons of 2.0mm thick and 1520mm width from Megasteel. When the plaintiff made its purchases from Megasteel the defendant had not made its orders yet. The defendant had never ordered 1.5mm steel coils. As at 11 June 2008 there was no PO from the defendant for 2.0mm. The invoices in B 51–56 were for 1.50mm and not 1.60mm. What was sold to Choo Seng was 1.50mm. He agreed the PO would show Choo Seng had ordered 1.50mm. The POs from Choo Seng were placed after the defendant's cancellation. He doesn't know the actual date. PO is the first document sent when goods are ordered. On B 44 he said this was the same as A 16. A 16 is Appendix A to the statement of claim and sets out the particulars of the losses and the steel coils are described as '1. 1.60mm x 1219mm x C' and '2. 2.00mm x 1219mm x C'. He disagreed A 16 was a mistake and that was why the amendment in B 48 was made. To a question if they knew for sure it was 1.5mm A 16 would have shown it, he answered he can't remember when the calculation in A 16 was done; the order from the defendant was for 1.6mm and it was sold to Choo Seng at 1.5mm. The sale was on 21 October 2008 and the statement of claim in 2009. He is unable to say why it was put as 1.6mm in the statement of claim. He disagreed B 48 was an afterthought. He said the plaintiff had two categories of customers and these were regular and ad hoc. He agreed the plaintiff at all times had a healthy stock. The healthy stock is to meet the defendant's and other customers' needs. He agreed the sufficient stock was to meet market demands and to take advantage of price increase. On the plaintiff's losses he disagreed these were normal third party transactions which had nothing to do with the defendant. In relation to B 57–158 there were no POs in the bundle of documents. PO will show when the order was made and

A the specifications. On B 159–175 he was not able to say if the deliveries were in respect of the three agreements with Megasteel. On the proof that 1.6mm was sold at a lower price he referred to B 56 and 160 which showed the same coil number. To a question that the plaintiff had sent Choo Seng 1.5mm when they hadn't asked for it he referred to B 35 on specifications and said if it was within B the tolerance level they could sell. They had used 1.6mm to deliver 1.5mm. He disagreed Choo Seng would have ordered 1.5mm and would have wanted 1.5mm and not 1.6mm. He said Choo Seng would be able to confirm this and not him.

C

[15] In re-examination on the contracts with Megasteel being prior to the defendant's POs he explained Megasteel needed the plaintiff to put in their PO and contract two months before; the plaintiff would get the orders from clients and add on to the stock which they think will meet the demand and put in a D lump sum order. 1.5mm in B 48 and 1.6mm in A 16 is the same product. There was no buyer for 1.6mm and that was why they sold to Choo Seng as 1.5mm. The tolerance level was such it was alright to sell 1.6mm as 1.5mm. The plaintiff sold to Choo Seng what was received from Megasteel. Choo Seng did not dispute the 1.5mm and had paid for it.

E

(i) Finding

[16] Insofar as the contracts of the plaintiff with Megasteel were made before the defendant's POs the evidence of PW1 that Megasteel required them to put F in its order two months beforehand is acceptable and in consonance with any normal industry standards to have stock in hand to meet the orders from customers. DW3 had also said if they ordered from the plaintiff and there was no stock they would not wait and would order from other suppliers.

G **[17]** The documents the plaintiff produced to support the sale to third parties were B 48–50 and the plaintiff's invoices and delivery orders B 51–158. Although the documents were marked as exhibits the defendant had contended the POs of the third parties were not produced before the court. PW1 had given evidence there were no such POs in the bundle of documents. According H to PW1 PO is the first document sent when goods are ordered and will show when the order was made and the specifications. The sale to Choo Seng was 1.5mm steel coils which the plaintiff says came from the 1.6mm intended for the defendant. As they could not find any buyer for 1.6mm they downsized the measurement and sold it as 1.5mm. It was submitted by the defendant's I counsel the 1.5mm could have come from the 1.6mm stock which the plaintiff already had and there was no reason for it to sell 1.5mm from the 1.6mm stock intended for the defendant and the purchase orders from Choo Seng would have shown what it had ordered. In this regard the relevant invoices in B 51–56 even without Choo Seng's PO supports the sale of 1.5mm to Choo Seng as the

coil ID sold to Choo Seng had the same coil ID of the 1.6mm delivered by Megasteel as evident from B 55 and 160. Further there is a tolerance specification allowed in the steel coils industry as shown in B 35.

[18] On the sale of the 2.0mm to various third parties it was submitted by the plaintiff counsel the sale was supported by the invoices in B 57–157 and its witnesses were not cross-examined on it. In the defendant's counsel written submission it was submitted at pp 9–10 the width of the 2.0mm steel coil purchased from Megasteel was 1520mm, 1210mm and 1219mm whereas what was sold to third parties had a width of 1524mm and it had not been established the sale was from the Megasteel stock. When the case came up for oral reply on 15 May 2014 the court specifically asked the defendant counsel on the issue of no cross-examination he replied 'the documents speak for themselves. There were no POs'. In this regard there was no cross-examination on the sale of the 2.0mm to the other third parties as was done in the sale to Choo Seng specifically on the sale of 1524mm width and whether it came from the Megasteel stock where the width was 1520mm, 1210mm and 1219mm. In the absence of any cross-examination the defendant is deemed to have accepted the evidence in the form of the invoices that the plaintiff had sold 2.0mm steel coils to the third parties. The absence of POs does not detract from this finding as the plaintiff has proved the sale by invoices.

[19] Refer to *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794 it is stated:

> ... It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. ... It applies with equal force in the trial of civil cases as well.

[20] With regard to the description of 1.6mm in Appendix A to the statement of claim in A 16 as opposed to 1.5mm in B 48 it was earlier the court's finding the plaintiff had sold to Choo Seng the 1.6mm it received from Megasteel. The 1.6mm and 1.5mm were in fact the same product as testified by PW1.

[21] The plaintiff has thus proved its losses in that it had sold the steel coil to third parties as per the invoices and delivery orders in B 51–158 read together with the summary in B 48–50.

[22] In *Central Cables Berhad v Cablecon Sdn Bhd* [2011] 1 LNS 1116 the court there had stated where there is a breach of fundamental importance the innocent party is entitled to treat itself as being discharged from further obligations under it. The Court of Appeal case of *Ching Yik Development Sdn*

Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 at p 681 was referred to:

> In every contract, ... there are some terms of fundamental importance and others of less or minor importance. Where the term that has been flouted is fundamental to the contract the innocent party is entitled to treat itself as being discharged from further obligations under it. ...

The same applies here where the defendant was in breach of a term of fundamental importance in not taking delivery of the steel coils already ordered; it having been proved there was no non compliance of specifications in the slitted steel coils which had earlier been delivered and paid for.

COUNTERCLAIM

[23] The defendant had not produced any documentary evidence that it had incurred the sum of RM40,000 to rectify the alleged defects.

CONCLUSION

[24] The plaintiff's claim in para 12 is allowed with interest of 5%. The defendant's counterclaim in para 21 is dismissed. Costs to the plaintiff.

Claim allowed and counterclaim dismissed.

Reported by Ashok Kumar